IN THE

Supreme Court of the United States

October Term, 1960.

No. 510.

HERMAN KRAVITZ,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT.

The nature of the brief filed by the Government in opposition to the petition for a writ of certiorari makes necessary a short reply.

1. The Government properly does not seek to defend —as it cannot—the prosecutor who not only suppressed the fact that prior to the commencement of this trial the Government had agreed to the dismissal of the indictment in New Jersey against Abrams, but misled the jury to be-

lieve that Abrams would be brought to trial (Petition, pp. 19-20, 29-30). Cf. *Napue v. Illinois*, 360 U. S. 274 (1959), where the mere failure of the prosecutor to correct a misstatement as to a promise of leniency was held to warrant a reversal. It is not sufficient, therefore, for the Government to omit any reference to these facts: it should, in candor, join in asking this Court to grant this petition and to reverse the judgments of conviction.

2. The Government's attempt to distinguish *United States v. Wiley*, 278 F. 2d 500 (7th Cir. 1960), on the ground that the defense there was "not frivolous" (Gov't Brief, p. 11) is a misreading of that case and a misstatement of this case.

Contrary to the implication in the Government's brief, the defense here was not frivolous. The Government's own agent, testifying as an expert, admitted that if Abrams received all of the "proceeds of the fraud", petitioner would not owe additional personal income taxes (552a), and thus could not have been guilty of evasion. Again, in the light of this agent's further testimony (570a-571a), there was a substantial question as to whether there was any additional income tax due from the corporation.

The *Wiley* decision did not hinge upon the nature or quality of the defense, but upon the fact that the trial judge punished the defendant for electing to stand trial. That is exactly what the trial judge did here as evidenced by the fact that he accused petitioner of "animal-like" conduct in electing to stand trial rather than to plead guilty in *exchange* for his father's freedom (749a-750a).

The Government suggests that petitioner waited fifteen months before changing his plea and elected to stand trial for purposes of delay. It was the Government that is accountable for the delay, not petitioner. Petitioner reluctantly changed his plea to guilty on the advice of counsel that by his cooperation in testifying before the grand jury in New York against Abrams the charges against his father

would be dismissed and he could expect a suspended sentence (24a). Although the Government announced that it was ready to move this case for trial ten days after arraignment (32a), it did not do so. Certainly petitioner had nothing to do with this delay. It was not until the *Government's* delay of fifteen months that petitioner became apprehensive, with good reason as the facts show, and sought to change his plea. Indeed, the trial judge admitted that if he had not expressed his thoughts petitioner would not have moved to withdraw his guilty plea (30a). And, the fact is that the Government never brought Abrams to trial in New Jersey; instead, it used him as a witness *against* petitioner.

Petitioner's decision to plead not guilty obviously was not made to obtain delay, nor was it "animal-like", but was based upon the belief—since in part vindicated—that he and his father were innocent of the indictments. For this belief he may not be punished.

3. The Government concedes (Gov't Brief, p. 9) that there was no evidence, except Abrams' testimony, that petitioner received any part of "the proceeds of the fraud". Yet it was precisely this uncorroborated testimony—as to which Abrams stood most to gain, and placed squarely in issue his credibility—upon which petitioner received the maximum sentence of five years on the charge of evading his personal income tax. The Government cannot, therefore, sweep under the rug the defense that Abrams received all the proceeds of the fraud with the cavalier statement that the guilt of petitioner was "fully established". Nor can it justify the refusal of the trial court to read the testimony before the New York grand jury with the remark that it would affect "only" the charge against petitioner for the attempted evasion of his own income tax. This "only" resulted in five years *additional* penal servitude.

The issue of Abrams' credibility was one of critical importance. Notwithstanding judicial prerogative, to com-

ment on the evidence, and notwithstanding any instruction to the jury that it is the sole judge of credibility, a trial judge may not as was done in this case, artfully remove from the jury its prerogative and lead it down the road to conviction.

Moreover, it is obvious that the grand jury testimony "lying unread" is here relevant. Petitioner subpoenaed the grand jury notes, but the trial court quashed the subpoena (460a-465a). Petitioner promptly sought to procure them in New York, but had to have them transcribed. They were not disclosed to petitioner, but were sent to the trial judge in this case, who refused to extend the trial for a single day, and who "didn't bother" to read them after he received them (742a).

It is not accurate that petitioner made no explanation with respect to his request, for the trial court was kept fully informed. Nor is it accurate that the relevance of the grand jury notes was not shown (Petition, pp. 15-16, 26-27).

At any rate, the trial judge was under a duty to examine the grand jury notes to determine whether the Government had mounted inconsistent prosecutions and indeed omitted to produce evidence inconsistent with its prosecution. Cf. *Alcorta v. Texas*, 355 U. S. 28 (1957).

4. The Government does not attempt to excuse the prosecutor's charge of treason, but merely begs the question by asserting that it was not prejudicial. It is noteworthy that while the Court of Appeals, which the Government quotes (Gov't Brief, p. 9), would not "attribute a stupidity and absence of common sense" to a federal jury, it found that there was not enough evidence "to justify twelve reasonable jurors" to find petitioner's father guilty. The Government, despite its omniscience, cannot deny with any sense of authority, that this remark of the prosecutor was an influential factor.

CONCLUSION.

For the foregoing additional reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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